

LARRY O. WATKINS
Claimant

FOOD BARN

AND Respondent

CREDIT GENERAL INSURANCE
Insurance Carrier

AND

Docket No. 175,836

The record reviewed by the Appeals Board and the stipulations of the parties are listed in the Award. Additionally, the parties stipulated that the reports of Ernest R. Schlachter M.D., and Robert G. Clark, M.D., dated July 8, 1993 and February 11, 1993, respectively, and referenced in the initial Award dated April 13, 1994, were part of the evidentiary record to be considered.

ISSUES

This case involves claimant's request to review and modify an agreed Award dated April 13, 1994 wherein the claimant was granted permanent partial general disability benefits based upon an 8 percent whole body functional impairment rating. In the Award dated August 31, 1995, the Special Administrative Law Judge found that the initial Award should not be modified, and the claimant requested this review. Claimant contends the initial Award should be modified because the respondent ceased doing business and terminated claimant, who is now unable to find employment. Therefore, claimant contends he is now entitled to permanent partial disability benefits based upon a work disability. The sole issue now before the Appeals Board on this review is whether the initial Award entered in this proceeding should be modified.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

Claimant is entitled to modification of the initial Award entered in this proceeding to reflect that claimant is entitled to permanent partial general disability benefits for a 27 percent work disability commencing March 29, 1994.

By an agreed Award entered into by the parties pursuant to a November 1993 settlement conference and journalized April 13, 1994, the Administrative Law Judge granted claimant permanent partial general disability benefits for an 8 percent whole body functional impairment. When the agreement was struck, claimant had returned to his former job and was working for the respondent as a butcher.

As a result of respondent's severe financial problems, on March 28, 1994 claimant was terminated by respondent. The respondent initiated bankruptcy proceedings and ceased business operations at the store where claimant worked. Although he applied for employment with the new company that took over the facilities where he worked, claimant was not hired and has been unable to find other employment since his termination. Because he no longer works for the respondent and is unable to find other work that pays a comparable wage, claimant contends he is now entitled to permanent partial general disability benefits based upon a work disability.

Claimant worked 15 years for the respondent cutting and packaging meat. In 1992, claimant developed symptoms of bilateral carpal tunnel syndrome and in December 1992 underwent right carpal tunnel release surgery by Wichita plastic surgeon Robert G. Clark, M.D. When he began treatment with the doctor, claimant had numbness and tingling in both hands and nerve conduction tests that indicated median nerve dysfunction in both upper extremities and some ulnar nerve dysfunction. In February 1993, Dr. Clark released claimant to return to work for the respondent with the restriction he was to perform only those duties he could tolerate. When released, claimant was somewhat surprised because he thought the doctor was going to operate on the left hand. Claimant returned to his butcher's position and performed that job until his termination without a significant increase in his symptoms. Claimant testified he performed the same duties that he did before he was injured except for lifting heavy boxes, which other crew members handled for him. He also testified that since his injury he has had problems holding items and often drops them. After his termination claimant drew unemployment benefits and applied for work at numerous companies. However, because he did not feel he was physically capable of

performing a line job, he did not apply at any of the local meat-packing plants. At the time of his last hearing, claimant remained unemployed.

Dr. Clark eventually released claimant to return to work without restrictions, although he acknowledges he initially told claimant to work up to his tolerance level. Dr. Clark believes claimant is capable of performing the butcher's job he held with respondent.

Ernest R. Schlachter, M.D., indicated in his report that claimant's diagnosis is overuse syndrome of both upper extremities with bilateral carpal tunnel syndrome, right previously operated, and bilateral medial epicondylitis. Dr. Schlachter believes claimant should observe the permanent work restrictions and limitations of no repetitive pushing, pulling, twisting or grasping motions with either arm or hand, no use of vibratory tools or working in cold environments, and that he should avoid repetitive lifting more than 10 pounds or 20 pounds on a single lift with either arm or hand. He believes claimant's work as a butcher is outside his permanent restrictions and limitations.

At the request of his attorney, claimant saw human resources consultant Jerry D. Hardin in May 1994. Mr. Hardin testified that claimant is now limited to the light and medium categories of labor and has lost 65 to 70 percent of his ability to perform work in the open labor market assuming Dr. Schlachter's restrictions are appropriate. However, he acknowledges that claimant would have no loss of ability to perform work in the open labor market assuming claimant had no restrictions as indicated by Dr. Clark. He also testified claimant presently has the ability to earn \$240.00 per week considering Dr. Schlachter's restrictions.

Because his is a "non-scheduled" injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 1992 Supp. 44-510e. That statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages had been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Based upon the above, the Appeals Board finds claimant returned to work at a comparable wage and is entitled to permanent partial disability benefits based upon the 8 percent whole body functional impairment rating from the date of accident until claimant was terminated on March 28, 1994. Although the date of accident was not specifically stated in the initial Award, it appears the parties used the date of October 2, 1992. Therefore, the Appeals Board adopts that same date for purposes of this Order. For the period before claimant's termination, claimant's benefits are to be computed based upon the stipulated average weekly wage of \$533.98.

The Appeals Board also finds claimant is entitled to permanent partial disability benefits based upon a 27 percent work disability for the period after the March 28, 1994 termination. Once respondent terminated claimant's employment and failed to offer

accommodated employment paying a comparable wage, the presumption of no work disability found in K.S.A. 1992 Supp. 44-510e is overcome and claimant became entitled to permanent partial disability benefits based upon the higher of his work disability or functional impairment. See Lee v. The Boeing Company - Wichita, 21 Kan. App. 2d 365, 899 P.2d 516 (1995). As the Court stated in Lee, the presumption of no work disability was designed to help prevent a worker from "double-dipping." However, it was not the intent of the legislature to deprive an employee of work disability benefits when the employer does not provide employment paying a comparable wage and the employee is not engaging in comparable wage work elsewhere.

Because claimant has residual symptoms from his bilateral upper extremity injuries but was able to return to work in his former butcher's position and perform that job for a year without significant increase in symptoms, the Appeals Board finds claimant's actual restrictions and limitations fall somewhere between those provided by Dr. Schlachter and the complete lack of restrictions from Dr. Clark. Based on this finding, the Appeals Board concludes that Jerry Hardin's opinions regarding loss of ability to earn a comparable wage and loss of ability to perform work in the open labor market should be averaged taking into consideration both doctors' opinions. Therefore, the Appeals Board finds claimant has lost approximately 34 percent of his ability to perform work in the open labor market and approximately 20 percent of his ability to earn a comparable wage. Claimant's loss of ability to earn a comparable wage is based upon the finding that claimant's average weekly wage for the period after March 28, 1994 is \$609.47 which is comprised of \$533.98, the stipulated wage for the initial award, plus \$75.49, the stipulated weekly value of additional compensation items that were discontinued upon claimant's termination. For the period after claimant's termination, the permanent partial general disability benefits are to be computed based upon an average weekly wage of \$609.47.

The Appeals Board is not required to weigh equally loss of ability to perform work in the open labor market and the loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this case there appears no compelling reason to give either factor greater weight and, accordingly, they will be weighed equally. The result is an average between the 34 percent loss of ability to perform work in the open labor market and the 20 percent loss of ability to earn a comparable wage resulting in a 27 percent work disability, which the Appeals Board considers to be an appropriate basis for the award in this case.

Based upon the above, the Appeals Board finds claimant is entitled to permanent partial general disability benefits based upon his functional impairment rating of 8 percent for the period before March 29, 1994 and an average weekly wage of \$533.89, and permanent partial general disability benefits based upon a 27 percent work disability and an average weekly wage of \$609.47 commencing March 29, 1994. Because claimant filed his request for review and modification with the Division of Workers Compensation on September 16, 1994, the effective date for modification is March 29, 1994. See K.S.A. 44-528(d).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered August 31, 1995 and the agreed Award dated April 13, 1994 should be, and hereby are modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Larry O. Watkins, and against the respondent, Food Barn, and its insurance carrier, Credit General Insurance, for an accidental injury which occurred October 2, 1992 and based upon an average weekly wage of \$533.89, for 11.14 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$3,330.86, followed by 66.29 weeks of permanent partial disability at the rate of \$28.48 per week or \$1,887.94 for an 8% permanent partial general disability, followed by 337.57 weeks at the rate of \$109.71 per week or \$37,034.83 for a 27% permanent partial general disability, making a total award of \$42,253.63.

As of February 2, 1996, there is due and owing claimant 11.14 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$3,330.86, followed by 66.29 weeks of permanent partial disability compensation at the rate of \$28.48 per week in the sum of \$1,887.94, followed by 97.86 weeks of permanent partial disability compensation at the rate of \$109.71 per week in the sum of \$10,736.22, for a total of \$15,955.02 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$26,298.61 is to be paid for 239.71 weeks at the rate of \$109.71 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
Robert Benham, Lenexa, KS
John C. Nodgaard, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director